MOTION FILED

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No. 93-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANR PIPELINE COMPANY, *et al.*,
Petitioners,

v.

DIRECTOR OF PROPERTY VALUATION,
DEPARTMENT OF REVENUE OF THE STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

JOHN H. CHEATHAM, III *
General Counsel
INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Counsel for Amicus Curiae
Interstate Natural Gas Association of America

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* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Interstate Natural Gas Association of America ("INGAA") hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari filed by ANR Pipeline Company, *et al.* in this case.[1]

INGAA respectfully submits that there are compelling reasons for the Court to grant this motion. INGAA is a national non-profit trade association[2] that represents virtually all of the major interstate natural gas pipeline companies operating in the United States, which account

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[1] The state of Kansas refused to consent to INGAA's filing of a brief as *amicus curiae*.

[2] INGAA has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

for over 90% of all natural gas transported and sold for resale in interstate commerce.[3] INGAA's members also include major Canadian interprovincial pipelines as well as British Gas, plc, Gaz de France, and Pemex-Gas y Petroquimica Basica.[4] As such, INGAA is vitally concerned about discriminatory taxation of interstate pipelines.

INGAA's members transport gas from the production area to the city gate for distribution and public consumption. In the course of this interstate transportation, natural gas pipelines can pass through numerous states. Many of these states tax pipelines in the discriminatory manner of the Kansas ad valorem tax challenged here. These discriminatory taxes on interstate pipelines are politically attractive to state legislators because they do not burden the local electorate. In Kansas, for example, more than 90% of the natural gas pipeline property is owned and operated by corporations based outside of Kansas. As a result, Kansas' discriminatory tax burden falls almost exclusively on non-residents.

Moreover, because property taxes are included in pipelines' rate bases, Kansas' (and other states') discriminatory tax assessments ultimately result in higher prices to millions of individual non-resident gas consumers. This adversely impacts the ability of natural gas to compete with other fuels, especially those fuels that are transported on railroads and thus receive the benefits of the Kansas-type property tax scheme. As a result, serious market distortions occur and energy consumers are deprived of the right to choose from suppliers competing on an unsubsidized basis.

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[3] INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*

[4] A complete list of INGAA's members is included in the Appendix at pp. 1a-2a.

In the attached brief, INGAA endorses, but does not reprise, the arguments offered in the petition for certiorari. Instead, INGAA sets forth additional reasons for granting the petition. INGAA highlights the federalism and other concerns raised by the holding below that a federal statute designed to stop discrimination against rail property somehow disables application of state and federal constitutional anti-discrimination principles to *non*-rail property. INGAA also explains that discriminatory property taxation of interstate carriers is a serious and growing problem that is not limited to Kansas or natural gas pipelines. Indeed, more than a dozen other states—from Alabama to Wisconsin—already have adopted property taxation practices that unreasonably discriminate against natural gas pipelines and other interstate carriers. See, *infra* p. 8 & n.5. INGAA believes that its unique national perspective will assist the Court in addressing the important federal questions raised by the petition. Accordingly, INGAA respectfully requests that the Court grant INGAA leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

JOHN H. CHEATHAM, III *
General Counsel
INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Counsel for Amicus Curiae
Interstate Natural Gas
Association of America

July 13, 1994

* Counsel of Record

QUESTION PRESENTED

Amicus will address the following question:

> Whether the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, a federal statute that prohibits discriminatory state taxation of interstate railroad property, prevents application of both state tax uniformity laws and the Fourteenth Amendment guarantee of equal protection to *non*railroad property.

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BRIEF *AMICUS CURIAE* OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION AND STATEMENT

As this Court recently recognized, "[t]he power of state and local governments to impose ad valorem property taxes upon railroads and other interstate carriers has been the source of recurrent [constitutional] litigation." *Department of Rev.* v. *ACF Indus., Inc.*, 114 S. Ct. 843, 845 (1994). It is no mystery why this is so. Taxes imposed upon interstate carriers are borne primarily by individuals—*e.g.*, shareholders and consumers—beyond the

borders of the assessing state. Thus, by increasing the tax burden on interstate carriers, the assessing state may decrease the tax burden on its own residents.

This Court has repeatedly held that the Constitution places strict limits on a state's power to export its tax burden in this fashion. Thus, although "[a] state may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 344 (1989), it may *not* discriminate against outsiders by creating arbitrary classes of property that bear no rational relationship to any legitimate state purpose. See, *e.g., Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 882 (1985). Nor will the Equal Protection Clause of the Fourteenth Amendment abide discriminatory *enforcement* of a facially neutral classification scheme. See *Allegheny Pittsburgh*, 488 U.S. at 345; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445 (1923) ("it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property") (internal quotations omitted).

As the decision below demonstrates, however, this Court's constitutionally-mandated intolerance of unreasonably discriminatory tax schemes has not quelled the desire of states to impose them. This case presents a challenge to the latest (and most creative) state effort in that regard. The state of Kansas concedes that it discriminates in the enforcement of its property tax laws *within* the state-recognized class of public utility property by offering favored public utilities side deals that substantially reduce their effective tax rates. That, of course, is exactly the type of unreasonable preferential treatment that this Court condemned as violative of the Equal Protection Clause in *Allegheny Pittsburgh*. In the decision

below, however, the highest Court of the State of Kansas ruled that in passing the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 ("4-R Act"), a federal statute that *prohibits* discriminatory taxation of interstate rail carriers, Congress unwittingly *authorized* discriminatory taxation against other interstate carriers. See Pet. App. 16a-19a.

The Kansas court's creation of this broad new exception to the rule of *Allegheny Pittsburgh* and its predecessors directly conflicts with an earlier decision of the highest court of the State of Nebraska. See *Northern Natural Gas Co.* v. *State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989). Moreover, challenges to similar discriminatory tax schemes that target certain interstate carriers are currently pending in a number of other jurisdictions. See, *infra* p. 8. This swelling jurisdictional split over the effect of a *federal* statute on the *federal* constitutional guarantee of equal protection (and state tax uniformity laws) has an immediate and irreparable impact on the targeted interstate carriers and on the competitive structure of the markets served by those carriers. In the energy industry, for example, the tax burdens of interstate carriers—and hence the rates of energy consumers nationwide—now turn on which of two conflicting interpretations of the 4-R Act happens to prevail in various assessing jurisdictions.

Amicus curiae respectfully submits that this Court should grant the petition in order to resolve the existing conflict, harmonize the commands of the federal 4-R Act and the Equal Protection Clause of the Constitution, and safeguard both established principles of federalism and Equal Protection limits on discriminatory taxation.

REASONS FOR GRANTING THE PETITION

Public utility property, including the property of most interstate carriers, is taxed at a higher rate than other commercial and industrial property in the state of Kansas. The Kansas Constitution, which guarantees "a uniform and equal rate of assessment and taxation," Kan. Const. art. 11, § 1(a), does provide, however, that all property *within* the public utility class shall be assessed "uniformly" at 30% of its value. *Id.* § 1(b). See also Pet. App. 19a ("Art. 11, § 1 [of the Kansas constitution] treats all public utility property alike"). Thus, the Kansas constitution mirrors the federal Equal Protection Clause prohibition against discriminatory assessments within a class. See, *e.g.*, *Allegheny Pittsburgh, supra.* Kansas includes both interstate railroads and interstate pipelines within the public utility class. See Kan. Stat. Ann. § 79-5a01(a) (1989). Notwithstanding the dual state and federal command of uniform taxation within a class, however, Kansas does *not* assess railroad and pipeline property uniformly.

During the relevant period, petitioners' pipeline property was assessed at the full 30 percent rate set out in the Kansas constitution. Railroad property, by contrast, was assessed at effective rates as low as *6 percent.*[1] Kansas claims that it granted this preference to railroads in settlement of the railroads' 4-R Act challenges to Kansas' practice of assessing railroad property (like all other public utility property) at higher rates than other commercial and industrial property. Whatever Kansas' *ad hoc* rationale for discriminating in favor of railroads within the broader class of public utilities, however, it is clear that

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[1] During the relevant period, railroad real property was assessed at rates as low as 22.3 percent of value. *See, e.g., Burlington N. R.R.* v. *Beshears*, 1991 Consent Decree, ¶¶ 19-20. Further, a full 80 percent of railroad personal property was exempted from property taxes altogether, resulting in an effective assessment rate of only 6 percent of value. *See, e.g., Burlington N. R.R.* v. *Rolfs*, 1989 Consent Decree, ¶¶ 14-15, 17.

the state's property tax scheme involves precisely the sort of "intentional systematic undervaluation by state officials of . . . taxable property in the same class" that this Court condemned in *Allegheny Pittsburgh*. See 488 U.S. at 345. See also *Hillsborough County* v. *Cromwell*, 326 U.S. 620, 623 (1946) ("the equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class").

In a strained effort to save Kansas' impermissibly discriminatory tax scheme, the court below ruled that the 4-R Act, which prohibits states from assessing *railroad* property at "a higher ratio to the true market value" than other commercial and industrial property, 49 U.S.C. § 11503(b)(1), somehow also prevents application of both the state *and* federal constitutional guarantees of equal protection to *non*railroad property. The court reached that conclusion notwithstanding its own concession that "there is absolutely no indication in the record that Congress intended, by the enactment of [the] 4-R [Act], to preempt or affect how pipeline property was assessed or taxed by the states." Pet. App. 15a.

The decision below directly conflicts with a prior decision of the Nebraska Supreme Court. In *Northern Natural, supra*, the Nebraska court properly recognized that although the 4-R Act may explain *why* a state treats railroads differently than other property owners in the same class, it does not *justify* the different[illegible]l. See 443 N.W.2d at 256 ("it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: the equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of [the pipeline company] as that in the case of the railroad and car companies"). Thus, both the state uniformity requirement and the Fourteenth Amend-

ment to the Constitution "remain viable." See *id.* at pp. 255-56, 260. Having concluded that the real and personal property of railroads and pipelines belong in the same public utility class for taxation purposes, Kansas' executive officers may not, consistent with the constitutional requirements of equal protection and uniformity, tax them differently.[2]

This case thus squarely presents a conflict on a recurring and important question of federal law—the federal 4-R Act currently means one thing in Nebraska and quite another in Kansas (as well as Alabama and Tennessee).[3] More importantly, because the Kansas court used its novel interpretation of the 4-R Act as a springboard to modify both state and federal requirements of equal protection, the split among the lower courts has constitutional significance on a number of levels.

First, as this Court made clear in *ACF*—which was decided *after* the Kansas decision under review[4]—the

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[2] This is not to say that states *necessarily* must confine property taxation of *non*-rail interstate carriers within the limits the 4-R Act imposes with respect to rail carriers. As noted, *supra* p. 6, states are free to assign different kinds of property to different classes that bear different tax burdens so long as the classifications are reasonable and bear some rational relationship to legitimate state purposes. In fact, Congress expressly gave the states a three-year grace period within which to adjust their taxation schemes consistent with the 4-R Act. *See* Pub. L. No. 95-473, § 2(b), 92 Stat. 1337, 1466 (1978). However, Kansas elected *not* to so modify its laws. Indeed, even when it modified its constitution in 1985, Kansas continued to classify railroads and pipelines together and to require them to be taxed uniformly. Thus, the Kansas legislature has concluded that, even in the wake of the 4-R Act, railroads and pipelines are similarly situated. Both the state and federal constitutions therefore require that they be taxed uniformly.

[3] *See State* v. *Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984); *Federal Express Corp.* v. *Tennessee State Bd.*, 717 S.W.2d 873 (Tenn. 1986) (4-R Act preempts state-law guarantee of "equal and uniform" tax treatment).

[4] Because *ACF* issued after the decision below, *amicus curiae* respectfully submit that, at a minimum, a remand to the Kansas

question whether the federal 4-R Act preempts *state* uniformity requirements implicates fundamental issues of federalism. In *ACF* this Court rejected a railroad challenge to a state exemption of certain *non*railroad property, because the 4-R Act does not speak to nonrailroad exemptions, and "[h]ad Congress, as a condition of permitting the taxation of railroad property, intended to restrict state power to exempt nonrailroad property, we are confident that it would have spoken with clarity and precision." 114 S. Ct. at 850. As the court below conceded, the 4-R Act also has nothing to say about how a state classifies taxpayers or whether it provides a guarantee of uniformity within a particular class. Thus, "interpreting" the 4-R Act to preempt such requirements, as the court below did, raises serious federalism concerns that should be resolved by this Court. See *id.* ("when determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope").

Second, even if the 4-R Act could somehow be read as preempting *state* constitutional uniformity requirements, the Kansas court's conclusion that the 4-R Act also eliminates the Fourteenth Amendment prohibition against discrimination within a class is nothing less than startling. Plainly, the Constitution's command that a state not discriminate among the members of a class *that the state has itself defined* and the 4-R Act's requirement that a state not discriminate against railroads can easily coexist. And even if they could not, it is the Fourteenth Amendment and not the 4-R Act that must prevail. See U.S. Const. art. VI.

Plainly, the proper scope of the 4-R Act and its impact (if any) on state tax uniformity requirements and the federal constitutional equal protection guarantee are uniquely federal questions that demand coherent federal

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court for reconsideration of its decision in light of *ACF* would be appropriate.

answers. Years of time-consuming and expensive litigation have failed to produce a clear answer from the lower courts, and the time has come for this Court definitively to harmonize the 4-R Act and state and federal constitutional guarantees of equal protection.

That this issue is recurring and important cannot be doubted—this type of abuse is by no means confined to the natural gas industry or to the state of Kansas. To the contrary, interstate carriers of all types—from MCI Telecommunications Corp. to petitioner Mapco Ammonia Pipeline, Inc.—have challenged the discriminatory Kansas property tax scheme. And litigation challenging similar discriminatory property tax systems is currently pending in a number of other states. See, *e.g.*, *ANR Pipeline Co.* v. *Wisconsin Dep't of Rev.*, No. 93-CV-4343 (Wis. Cir. Ct. filed May 9, 1994); *In re ANR Pipeline Co.*, No. 727 (Iowa St. Bd. Tax Rev. filed Jan. 21, 1994). Indeed, more than a dozen other states currently discriminate against certain interstate carriers.[5] Thus, until resolved this conflict over the proper scope of the federal 4-R Act promises to have a substantial negative impact on interstate commerce.

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[5] *Amicus curiae* understand that the following states, although classifying both rail and non-rail carriers as public utilities, tax non-rail interstate carriers at higher rates than rail carriers: Alabama (rail carriers 20%, non-rail carriers 30%), Iowa (personal property of rail carriers, but not non-rail carriers, exempt from taxation), Louisiana (rail carriers 15%, non-rail carriers 25%), Michigan (rail carriers 50% of 40%, non-rail carriers 50% of 75%), Minnesota (personal property of rail carriers, but not non-rail carriers, exempt from taxation), Mississippi (rail carriers 15%, non-rail carriers 30%), North Dakota (personal property of rail carriers, but not non-rail carriers, exempt from taxation), Ohio (rail carriers 25%, non-rail carriers 88%), Oklahoma (rail carriers 11.9%, non-rail carriers 24%), South Dakota (personal property of rail carriers but not non-rail carriers, exempt from taxation), Tennessee (rail carriers 40%, non-rail carriers 55%), West Virginia (rail carriers 50%, non-rail carriers 56.165%), Wisconsin (personal property of rail carriers, but not non-rail carriers, exempt from taxation).

In summary, this case preesnts important questions of federal law which have not been, but should be, settled by this Court. The Court should grant the petition to resolve the conflict in the lower courts regarding the proper harmonization of the federal 4-R Act with the federal constitutional guarantee of equal protection.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN H. CHEATHAM, III *
General Counsel
INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Counsel for Amicus Curiae
Interstate Natural Gas
Association of America

* Counsel of Record

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APPENDIX

The full membership of the Interstate Natural Gas Association of America is:

Alabama-Tennessee Natural Gas Company
Alberta Natural Gas Company, Ltd.
American Oil and Gas Corporation
British Gas plc
The Coastal Corporation
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Delhi Gas Pipeline Corporation
El Paso Natural Gas Company
Enron Corp.
Equitrans, Inc.
Foothills Pipe Lines Ltd.
Gaz de France
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
KN Energy, Inc.
Koch Hydrocarbon Company
Leviathan Gas Pipeline Company
Lone Star Gas Company
Michigan Gas Storage Company
Mid Louisiana Gas Company
MidCon Corp.
National Fuel Gas Supply Corporation
NorAm Energy Corp.
Northern Border Pipeline Company
NOVA Corporation of Alberta
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Pemex-Gas y Petroquimica Basica
Questar Pipeline Company
Sabine Pipe Line Company
Sonat Inc.

Tenneco Gas
TransCanada PipeLines
Transco Energy Company
Valero Interstate Transmission Company
Westcoast Energy Inc.
Williams Natural Gas Company
Williston Basin Interstate Pipeline Company